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No. 90-1941

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

MOANIKEALA AKAKA, ROD BURGESS, CLARENCE CHING, FRENCHY DeSOTO, LOUIS HAO, MANU KAHAIALII, THOMAS KALUKUKUI, SR., MOSES, KEALE, SR., and KEVEN MAHOE,

Petitioners,

vs.

DOCTOR NUI LOA PRICE, a.k.a. MAUI LOA, individually and in his capacity as chief of the HOU HAWAIIANS, THE HOU HAWAIIANS, a Native Hawaiian Ohana, and KAMUELA PRICE, individually and in his capacity as member of the elder council of the HOU HAWAIIANS,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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SUMMARY OF ARGUMENT

Respondents' brief in opposition demonstrates more clearly than ever that this Court should grant review to correct the Ninth Circuit's expansive invitation to personal damage suits against state officials in Hawaii who

are charged, under state law, with the duties of expending funds derived from public trust lands conveyed upon Statehood by Hawaii's admission act.

ARGUMENT

A. Review Should Be Granted to Correct the Ninth Circuit's Expansive Presumption that Suits for Damages Under 42 U.S.C. 1983 are, Without More, "Individual Capacity" Suits.

The Ninth Circuit in this case expressly held that the sole reason Respondents were entitled to proceed at all against the Trustees of the Office of Hawaiian Affairs in their individual capacities was that, because money relief was sought, "[t]o sue Hawaii itself, by proceeding against the trustees in their individual capacities, would have been inconsistent with the very nature of [the] claim." Pet. App. 10a. This ruling, which intertwines the merits of a sovereign immunity defense with the notice conveyed by the complaint in a civil matter is as the Petition demonstrates, in square conflict with the decisions of three other circuits, and is at odds with all understanding of pleading practice, and, indeed, due process of law. *See* Pet. for Cert. at 14-17.

Respondents do not seriously defend the Ninth Circuit's judgment on its own terms, but instead argue that (a) the issue was waived (*see* Resp. Br. 5-6, 8), and, in any case (b) language in the complaint seeking liability

"jointly and severally" was sufficient to meet applicable pleading requirements (*id.* at 8).

Both arguments are seriously in error.

First, from the very beginning of this action, the Trustees have argued that the allegations of the Complaint did not state claims against them in their individual capacity.[1] Respondents do not dispute this fact. Rather, their objection is, at most to the "mere enlargement" of an error raised below, and, for this reason, Respondents' argument would be inapt even if this case arose from a state court, where the duty to preserve error below is at its height. *See, e.g., Bankers' Life Ins. Co. v. Crenshaw*, 486 U.S. 71, 78 n.2 (1988) (quoting *Dewey v. Des*

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[1] Respondents quote only selectively from Petitioners' memorandum in the District Court (*see* Resp. Br. 8), but do not dispute that Petitioners argued, and the District Court found, that the Complaint failed to allege facts sufficient to render the action one for individual capacity relief. *See* Pet. App. 22a (District Court order). Indeed, in their dispositive motion memorandum in the District Court, Petitioners went on at length to argue in passages omitted from Respondents' brief that they "are entitled to a dismissal of the claims against them in their individual capacities" as "this case is in reality an official capacity suit," in that "[a] suit against a state's agencies *or* its officers or agents [without more] is a suit against the state and not against its officers or agents in their individual capacities." *See* Clerk's Record ("C.R.") 12, No. 88-0773 (D. Haw. filed Nov. 1, 1988) (Mem. at 9) (citing *Kentucky v. Graham*, 473 U.S. 159 (1985)). Thus the fact that Petitioners stated below that "it appears that [Respondents] are *attempting* to obtain § 1983 damages against the trustees as individuals" (*see id.* and Resp. Br. 8) (emphasis added) does not concede anything about whether Respondents *sufficiently* attempted to do so to give Petitioners adequate legal notice.

Moines, 173 U.S. 193, 198 (1899)). Moreover, the Ninth Circuit's entire judgment rests on considered and express written rulings adopting the individual capacity-suit presumption. "It [thus] suffices for [this Court's] purposes that the court below passed on the issue presented," "particularly where the issue is. . . . '" in a state of evolving definition and uncertainty." '" *Virginia Bankshares, Inc. v. Sandberg*, 111 S. Ct. 2749, 2761 n.8 (1991) (citations omitted). Finally, because amendment of the complaint at this stage would be futile against the individual capacity defendants in light of the two-year statute of limitations that applies to pre-1990 claims filed under 42 U.S.C. § 1983 in the District of Hawaii (*see* H.R.S. § 657-7 (1985)), the issue of whether the Petitioners were properly sued in their individual capacities presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 416 (1990). In short, Question 1 presented by the Petition for Certiorari is before the Court.

Second, Respondents' effort to shore up the judgment below by calling attention to the words "jointly and severally" in the Complaint's prayer (*see* Resp. Br. at 8) only demonstrates why the Ninth Circuit's reversal is error. For Respondents' dictionary definition of "jointly and severally" (*see id.*) has nothing to do with the individual capacity/official capacity distinction as it has evolved in this Court's decisions. *E.g.*, *Kentucky v. Graham*, 473 U.S. 159 (1985); *Brandon v. Holt*, 469 U.S. 464 (1985). It does not provide any guidance as to whether execution, if it comes, will run against state funds as a general matter, state funds in the named officer's individual control, or

the personal assets of the named officer. Without the Ninth Circuit's individual-suit presumption, there is thus no basis for concluding that individual-capacity relief was properly sought in the Complaint. That presumption, which sharply conflicts with the rulings of the Sixth, Seventh, and Eighth Circuits, is groundless as a matter of logic and precedent, and is not even defended by Respondents. This Court should thus hold this case pending the disposition in *Hafer v. Melo*, No. 90-681 (U.S. cert. granted Feb. 25, 1991), which may bear upon the issue raised in Question 1, or grant plenary review now.

B. Review Should Be Granted to Correct the Ninth Circuit's Palpably Erroneous Refusal to Grant Qualified Immunity.

Respondents do not deny that they have conceded from the beginning of this suit that qualified immunity is an applicable defense to the claims presented in the Complaint.[2] Nonetheless, they argue that the defense is "raised too late and inadequately developed below to provide the basis for a writ of certiorari" (Resp. Br. at 7). Respondents then go on to argue that in any case that not only does the Complaint state a federal claim upon which

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[2] Respondents thus overstate the import of the District Court's finding, *see* Resp. Br. 5, in order to demonstrate, somehow, that Respondents did not waive their right to argue that Defendants waived the qualified immunity issue. However, as Respondents' brief below indicates, Respondents were of the view that any affirmative defense (such as immunity) was not properly subject to litigation in advance of the filing of an answer below. Pl. Mem. in Opp. to Mot. to Dis. at 2, No. 88-0773 (D. Haw. Dec. 6, 1988). Hence, no waiver of this issue occurred.

relief may be granted, but that, if the allegations of the Complaint are proven, Petitioners will have been shown to have violated "clearly established law" (*Id.* at 10-11).

Both propositions are wrong.

First, Respondents do not deny that Petitioners, at every stage below, disputed that the Complaint stated a federal claim cognizable pursuant to the application of 42 U.S.C. § 1983 to the Hawaii Admission Act. And, as this Court held recently in *Siegert v. Gilley*, 111 S. Ct. 1789 (1991), "[a] necessary concomitant to the determination of whether the [federal] right asserted by a plaintiff is 'clearly established' at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a [federal] right at all." *Id.* at 1793. Thus, for the reasons stated both expressly in the Petition, *see* Pet. at 17-19, and as may be discerned from the first case here on appeal, *Paty v. Napeahi*, No. 90-1937 (U.S. pet. for cert. filed June 18, 1991), *cited*, Pet. for Cert. at 2, the underlying merits of Petitioners' qualified immunity defense are concededly here to the same extent as in *Siegert*.[3]

Second, as to the precise issue whether, irrespective of the merits, Respondents have stated a claim against Petitioners that could survive qualified immunity, that issue, too, is properly before the Court. It plainly has not been waived, as the judgment in the District Court

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[3] Recognizing the impact of the *Paty* petition (No. 90-1937) to this appeal, the Department of the Attorney General has acquiesced in the filing, by Respondents here, of a brief amicus curiae bearing upon the issues in *Paty v. Napeahi*, No. 90-1937.

issued before an answer was even filed. *Compare Price v. Hawaii*, No. 91-15117, Slip Op. at 13008 (9th Cir. as amended Sept. 8, 1991) (answer is determinative pleading for preservation of defense). It is also proper that this Court consider the issue now. The issue was expressly raised in the District Court (*see* Resp. Br. at 5-7), *and*, implicitly, in Petitioners' Answering Brief in the Ninth Circuit. *See* Appellees' Ans. Br. at 35-36, No. 89-15169 (9th Cir. dated Dec. 4, 1989) ("Appellants have alleged a violation of state law only" and "there are no allegations set forth in the complaint, which if proved, would establish that Appellants' rights under the United States constitution or federal law have been infringed"). These strong arguments of necessity contain within them the narrower argument that, if any federal right at all has been alleged, it is not a clearly established one.[4] Moreover, even if the Ninth Circuit were to have been deemed to have deferred the issue of immunity to a further motion in the lower Court, the interests injured by the remand ordered below independently warrant consideration of the immunity question now, irrespective of the "pressed or passed upon below" rule. Indeed, *Siegert v. Gilley* expressly states that qualified immunity ought to have been given expeditious

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[4] Indeed, the Ninth Circuit held that, while special obligations imposed by the Hawaiian Homes Commission Act are not at issue here, the "source of the right Price asserts here is precisely the same as the source of the right claimed in *Keaukaha II*." Pet. App. 9a (citing *Keaukaha Panaewa Community Ass'n v. Department of Hawaiian Homes*, 739 F.2d 1467 (9th Cir. 1984)). To this extent, *cf. Anderson v. Creighton*, 483 U.S. 635 (1987), the Ninth Circuit has already expressly passed upon the immunity claim.

treatment in the appellate courts. *See* 111 S. Ct. at 1793. At the least, qualified immunity presents a question "antecedent to [the merits] and ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990).

Third, Respondents have no good answer to the qualified immunity defense. As an initial matter, while Respondents make much of a 1988 dispute concerning Petitioners' expenditure of public funds to determine whether all persons descended from the original inhabitants of the Hawaiian Islands should be eligible for native Hawaiian benefit programs (presently certain programs are limited by law to persons of fifty percent or more Hawaiian blood), this charge, as the Respondents' Brief admits, is nowhere in the record below, nor is the "investigative report" of the Attorney General dated November 2, 1988. *See* Resp. Br. 4-5 & nn. 1-2. Indeed, these matters were not cited anywhere in the lower court records.[5] Respondents thus virtually concede the Complaint contains no specific facts alerting Petitioners to the conduct alleged to have violated "clearly established law." Under the "heightened pleading standard" which the Petition

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[5] Respondents also fail to note that the state courts have resolved, in favor of the Trustees, an identical claim brought by other litigants. *See Kepoo v. Burgess*, No. 14770 (Haw. June 25, 1991) (Mem.), *infra*. To the extent the Respondents rely on the claim rejected in *Kepoo*, they are seeking to exacerbate the ongoing conflicts between the Ninth Circuit judgment in this case and the rulings of the state courts. *Compare, e.g., Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 69 Haw. 154, 174 P.2d 446, 458 (OHA has no judicially enforceable rights to 5(f) monies), *cert. denied*, 484 U.S. 898 (1987), *with* Pet. App. 6a (Respondents can show 5(f) funds must be used for them).

seeks from this Court as a general matter in cases implicating immunity, the complaint would fail.[6]

Moreover, regardless whether a heightened pleading standard is applied to the instant complaint, Respondents' have utterly failed to allege that Petitioners knowingly or recklessly violated *federal* law. *See* Pet. at 18 (citing *Davis v. Scherer*, 468 U.S. 183, 193-97 (1984)). As demonstrated in the Petition here and that in No. 90-1937, it is not a foregone certainty that Respondents even have alleged "a violation of a [federal] right at all." *Siegert, supra*, 111 S. Ct. at 1793. At the very least, there is but one answer to the "purely legal question," *id.*, whether, on the face of the complaint, qualified immunity should exist in this § 1983 action, and that is not the answer Respondents provide. For this central reason, the Petition for Certiorari should be granted as to Question 2, or the Court should grant the petition and vacate and remand for further consideration in light of *Siegert v. Gilley, supra*.

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[6] While Respondents say this Court should not grant review because the Complaint could be amended to deal with any "new rule" the Court would adopt requiring a heightened pleading standard, there is nothing, given the established protective function of qualified immunity, and the lack of any explicit precedent in the Ninth Circuit holding that heightened pleading is *not* required in immunity cases, that would require leave to amend in this case. In any event, even if leave were to be granted, the requirement of heightened pleading would minimize the costs of suit by allowing qualified immunity to be decided on a Rule 12 motion standard. *See Siegert*, 111 S. Ct. at 1793.

CONCLUSION.

For the reasons above, and in the Petition, the Petition for Certiorari and the relief it seeks should be granted.

Dated: Honolulu, Hawaii, September 23, 1991.

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APPENDIX "E"

NO. 14770

IN THE SUPREME COURT OF THE STATE OF HAWAII

ARTHUR KEPO'O, JOHN I. SIMEONA, SR., WILLIAM OILI, and RAYMOND I. KAMAKA, Plaintiffs-Appellants, vs. RODNEY K. BURGESS, III, CLARENCE F. T. CHING, ADELAIDE "FRENCHY" DESOTO, MANU KAHA 'IALI'I, MOSES K. KEALE, LOUIS HAO, THOMAS K. KAULUKUKUI, and KEVIN M. K. MAHOE, MOANIKEALA AKAKA, individually and officially as Trustees of the BOARD OF TRUSTEES, OFFICE OF HAWAIIAN AFFAIRS, STATE OF HAWAII, as a body corporate; JOHN D.WAIHEE, officially as Governor of the State of Hawaii, Defendants-Appellees.	CIV. NO. 88-2987 APPEAL FROM THE ORAL ORDER DENYING THE MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT, FILED MAY 5, 1989, PER COURT MINUTES DATED JANUARY 11, 1990 FIRST CIRCUIT COURT

MEMORANDUM OPINION

(FILED JUN 25 1991)

Appellants, four Hawaiians and native Hawaiians, appeal from an Order granting appellees' Motion to Dismiss or in the Alternative for Summary Judgment. In

1988, appellees Trustees of the Office of Hawaiian Affairs sought to determine whether their constituents, the Hawaiian community, endorsed eliminating the blood quantum distinction between "Hawaiians" and "native Hawaiians" through a nonbinding mail-out referendum. Appellants contend that appellees breached their fiduciary duty to administer the special trust intended solely to better the conditions of persons with more than 50% Hawaiian blood by (1) advocating a single beneficiary class definition of "native Hawaiian," and (2) expending special trust fund monies to inform and educate the Hawaiian community about the single definition referendum.

Upon review of the record, we find no reversible error and affirm. Although not necessary in our determination of this appeal, we note our disagreement with appellees' assertion that the legislature may alter the intended purposes of the section 5(f) public trust. In creating the section 5(f) public trust, Congress directed that all proceeds of the trust were to be used for "one or more" of five statutory purposes. *See* Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959). We therefore believe that the statutory purposes of the section 5(f) trust may not be changed without Congressional approval.

Affirmed.

DATED: Honolulu, Hawaii, June 25, 1991.

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